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Little Red Riding Hood, Justice Rehnquist, and the NEA

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Little Red Riding Hood, Justice Rehnquist, and the NEA

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The purpose of this paper is to analyze three cases involving the controversy over receipt of grants from the National Endowment for the Arts (NEA) with regard to the question of artistic freedom as protected by the First Amendment. The paper will analyze the extent to which the Supreme Court's decision in *Rust v. Sullivan*[1] sets a precedent whereby the government can control the content of the artistic works of those receiving government grants. Following a discussion of the unconstitutional conditions doctrine, the paper traces the opinions of Chief Justice William Rehnquist in earlier cases involving government funding and freedom of speech. Although the Court's contradictory opinions reflect the confusion surrounding the unconstitutional conditions doctrine, Rehnquist himself is consistent, demonstrating his firm belief that the government has a broad right to dictate behavior and even content of speech to anyone who receives government funds.

The three cases considered here are *New School for Social Research v. John Frohnmayer and the National Endowment for the Arts*,[2] *Bella Lewitzky Dance Foundation v. Frohnmayer*,[3] and *Finley v. National Endowment for the Arts*.[4]

In two other pending cases, *Claudio v. United States et al.*[5] and *Roth v. Recknor, Freeborn County Fair Board and Freeborn County*,[6] the issue is not NEA funding but artists' access to public forums on a content neutral basis. Although most Americans are no doubt far less concerned about the allocation of a few feet of public space for graphic art than they are about the allocation of their tax dollars by the NEA, for the two artists who filed complaints in these lawsuits, the right to exhibit their art to the public was clearly a right worth fighting for.

Cases Involving NEA Funding

Background: Congressional Amendments Affecting NEA Grants

The controversy over funding for the arts began in early 1989 when members of Congress in general and Senator Jesse Helms in particular learned that a $15,000 NEA grant provided through the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina was used to pay for a traveling art exhibition which included a Andres Serrano's photograph of a plastic crucifix in a jar of his own urine called "Piss Christ." Although the *Washington Post* defended Serrano's work as "the troubled but intelligent response of a religion-obsessed artist to the degradation of religion into televangelical religiosity in the age of Jimmy Swaggart, Jim and Tammy Bakker,"[7] Senator Jesse Helms disagreed with this interpretation.

At the same time, an exhibit of photographs by Robert Mapplethorpe opened in Philadelphia in December 1988. (Mapplethorpe died of AIDS in March 1989, shortly after the

exhibit went on tour.) The NEA had given a $30,000 matching grant to the Institute of Contemporary Art at the University of Pennsylvania to support this exhibit and to help cover the costs of moving the exhibit from Philadelphia to art museums in Chicago, Washington, D.C., Hartford, Connecticut, Berkeley, California, Cincinnati, Ohio, and Boston, Massachusetts. Two of Mapplethorpe's photographs were of children with their genitals exposed; five of the pictures contained graphic homoerotic or sadomasochistic images. Senator Jesse Helms was outraged. The storm of controversy over the Mapplethorpe and Serrano photographs provided Senator Jesse Helms with the ammunition he needed to launch an attack on the NEA.

Helms had been gunning for the NEA as early as 1975, when he wrote the late Nancy Hanks, chairman of the NEA from 1969 to 1977, complaining about the $5000 NEA grant Erica Jong had received to write *Fear of Flying*, which Helms described as a "filthy, obscene book." Helms demanded that Jong return the $5000 grant. Nancy Hanks replied: " . . . we have not considered requesting Miss Erica Jong to refund the $5000 grant. Even if we wished to, our General Counsel advises me that there would be no legal basis on which to do so. . . . "[8] Although Helms considered asking his legal assistant James P. McCelland to prepare a brief attacking the NEA at the time, he finally dropped the matter because at the time Helms was more interested in the brief McCelland had prepared attacking the panel structure of the National Science Foundation.

But when the Mapplethorpe/Serrano controversy surfaced in 1989, the timing for the NEA could not have been worse. The National Foundation on the Arts and Humanities Act[9] had established the NEA in 1965; it also stipulated a reauthorization deadline of September 30, 1990.[10] The Mapplethorpe and Serrano exhibits were frequently cited by members of Congress in debates over budget allocations for the NEA.[11] Jesse Helms introduced the "Helms Amendment," which would place a ban on "obscene and indecent art." On a voice vote to a nearly empty Senate, the amendment was adopted. Representative Dana Rohrabacher of California persuaded the House of Representatives to cut $45,000 from the NEA budget—a figure that represented $30,000 for Mapplethorpe's exhibit and $15,000 for Serrano's plastic crucifix.

State legislatures followed suit. City officials in Chicago had been angered in 1989 by a student painting at the School of the Art Institute of Chicago; the painting portrayed late Chicago Mayor Harold Washington in frilly lingerie.[12] When another student at the Art Institute exhibited an American flag spread on the floor and invited people to "confront their feelings" about patriotism and step on the flag if they chose, the Illinois Senate voted to reduce the School's grants from $130,000 to $1.

Aware of the tempest brewing in Congress, Director Christina Orr-Cahall of the Corcoran Gallery of Art in Washington, D.C. stunned the art community by canceling the Mapplethorpe exhibit in June 1989, breaking a two-year commitment between the Corcoran and Philadelphia's Institute of Contemporary Art. Several artists were so enraged that they canceled their own exhibits with the Corcoran; one artist, Lowell Nesbitt, cut the Corcoran out of a million-dollar bequest in his will.[13] The Corcoran later apologized for canceling the Mapplethorpe exhibit.[14] The Washington Project for the Arts (WPA) gladly agreed to display the Mapplethorpe exhibit in the Corcoran's place; it reported that 48,863 people—about 40 times the usual attendance—visited its gallery during the three weeks that the Mapplethorpe exhibit was on display. According to a staff member at the WPA, one woman told him she had come to see the Mapplethorpe exhibit four times, and each time she was more offended.

When the Contemporary Arts Center in Cincinnati, Ohio placed 175 of Mapplethorpe's

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photographs on exhibit, police quickly confiscated the seven controversial photographs and charged Dennis Barrie, director of the Contemporary Arts Center, with obscenity.[15]

While the general public flocked to the Mapplethorpe exhibit out of curiosity, Jesse Helms' ally Donald Wildmon,[16] Executive Director of the American Family Association (AFA), was urging AFA members to write to Congress and protest NEA funding for obscene or blasphemous art.

The pressure on the NEA was unrelenting, in part because the religious right discovered that the controversy revived its flagging fund-raising efforts.[17] (The AFA has over 60,000 members and raised $5.2 million through contributions in 1989 when the controversy began). The AFA also attacked the work of the late artist David Wojnarowicz, whose work had received a $15,000 NEA grant to move it to various galleries.[18]

The AFA placed a full-page ad in *The Washington Times* attacking NEA funding for the works by Mapplethorpe, Serrano, Wojnarowicz, and other exhibits; the ad also charged that the NEA had given $25,000 to The Kitchen, a New York Theatre which hosted a performance by former porn queen Annie Sprinkle whose partially nude, sexually explicit performance was alleged to be obscene.[19] Forced to respond, the NEA acknowledged that The Kitchen had received a $60,000 grant from the NEA, but neither the NEA nor the New York State Council on the Arts had funded the Annie Sprinkle performance.[20] The New York State Council on the Arts also issued a statement that it had funded 32 of the 36 planned performances at the Kitchen, but purposely had not funded the Annie Sprinkle performance because it was "not of an artistic quality to warrant Council support." The Kitchen likewise issued a press release explaining that no public funds from either the New York State Council on the Arts or the NEA had been used for Annie Sprinkle's "Post-Porn Modernist" performance.[21]

Congressional Amendments to NEA Policy

Congress could not escape the controversy over NEA funding of the Mapplethorpe and Serrano exhibits. In October 1989, Congress amended the statutory framework of the NEA, providing that:

> None of the funds authorized to be appropriated for the National Endowment for the Arts . . . may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts . . . may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value. . . .
>
> . . . If the Endowment finds that such a violation has occurred, the Endowment will recoup the grant money pursuant to its civil and administrative remedial powers.[22]

Legal scholar Rodney Smolla points out both the irony and redundancy of this amendment:

> Since obscene speech is not protected under current First Amendment doctrines, . . . it certainly enjoys no better fate when the government refuses to fund it. . . . In defining obscenity, the law parrots the language of *Miller*, which declares that material is not obscene if it has "serious literary, artistic, political or scientific value." But the Endowment can only make grants to projects that it believes *do* have serious artistic value. This is "now you see it, now you don't" prohibition; there is really nothing of substance to it. For if the Endowment has determined that the project is artistically meritorious, then *by definition* the Endowment has judged that it is not obscene. In short, the Endowment's general mandate to fund only artistically deserving works already includes, *built within it*, a prohibition of obscene works.[23]

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To implement this amendment, the NEA added a certification requirement: any artists, dance companies, or theatre groups receiving NEA funds would be required to certify in advance that none of the funds awarded would be used "to promote, disseminate, or produce materials which in the judgment of the NEA . . . may be considered obscene."

The arts community was outraged. A number of dance and theater companies refused NEA grants they had already been awarded rather than agreeing to sign the NEA's certification agreement. Producer Joseph Papp refused a $50,000 grant for the New York Shakespeare Festival because it would include a production of *A Midsummer Night's Dream* performed by a Portuguese-speaking cast which "sometimes wore nothing."[24] The Oregon Shakespeare Festival turned down a $49,500 grant, the Berkeley Shakespeare Festival turned down its NEA grant, performance artist Rachel Rosenthal turned down her grant even though she "needed the money badly."[25]

In his compelling account of his two and a half years as NEA Chairman, John Frohnmayer explains his motives for inserting Section 304 (a), known as the Helms Amendment, into the terms and conditions of NEA grants:

> I purposely inserted these words, verbatim, in the terms and conditions of NEA grants, although I don't claim I had the prescience to foresee exactly how that action would play out. I did so to assure Congress that it had gotten our attention and to make our applicants aware of the law so they would not inadvertently run afoul of it. . . . And it was an invitation to a lawsuit, which I hoped would lead to a finding that the language was unconstitutional. If I simply buried the language, we would have it forever; if we shined a light on it, perhaps someone would sue us and the law would be invalidated. Julie Davis, the Endowment's legal counsel, and I had discussed filing a declaratory judgment to test the law, . . . but we felt, among other reasons, that we were not secure enough with either the White House (the Justice Department would have to approve) or Congress to do so. . . .
>
> . . . I couldn't admit in the face of a hostile Congress, "Hey folks, I'm trying to force a lawsuit here so that your language can be declared unconstitutional." But that was precisely what I was doing.[26]

First Amendment Challenges to 1989 NEA Amendment

Frohnmayer's insertion of the Helms Amendment into the "terms and conditions" for NEA grants did indeed precipitate two lawsuits in which plaintiffs challenged the constitutionality of the 1989 amendment: *New School for Social Research v. John Frohnmayer and the NEA*[27] and *Bella Lewitzky Dance Foundation v. Frohnmayer.*[28]

New School for Social Research v. John Frohnmayer and the NEA

In *New School*, plaintiff's attorney Floyd Abrams argued that the Helms Amendment should be void for vagueness: " . . . it fails to define obscene conduct with sufficient specificity to satisfy either the *Miller* requirements or the vagueness standard. Thus it continues to leave the New School at sea as to what federally funded projects may later be found to be subject to the NEA's obscenity definition."[29] Abrams further argued that the NEA had imposed an unconstitutional condition on the receipt of federal funds because the Helms Amendment "was intended to suppress what were viewed as offensive and shocking ideas" such as Andres Serrano's "Piss Christ," which was controversial but not obscene.[30]

The New School ultimately reached an out-of-court settlement with the NEA when the NEA agreed to delete the Helms Amendment from the terms and conditions and replace it with: "The NEA intends to enforce Section 304(a) [providing for civil and criminal penalties] . . . after a grantee has been convicted of violating a criminal obscenity or child por-

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nography statute and all appeal rights have been exhausted."[31] The New School thus accepted its $45,000 grant from the NEA following the settlement.

Bella Lewitzky Dance Foundation v. Frohnmayer

Like the New School, the Bella Lewitzky Dance Foundation was notified in January 1990 that it had received a grant of $72,000. All grant recipients were required to comply with the Helms Amendment, Section 304(a), stipulating that grants could not be used for obscene works or performances, but Darlene Neel, the Foundation's company manager, crossed out and initialed Paragraph Two of the Terms and Conditions, indicating the Foundation's refusal to be bound by that condition. NEA General Counsel Julianne Davis notified the Foundation that it was bound by all of the Terms and Conditions if it intended to use the grant funds awarded to it. At that point the Foundation filed a complaint charging that the NEA's requirement that the funds awarded would not be used to promote or produce obscene material was unconstitutionally vague and was a violation of the First Amendment.

The case was consolidated with a similar complaint by the Newport Harbor Art Museum, which had been approved for NEA grants totaling $100,000, but the Museum's Board of Trustees resolved not to comply with the Terms and Conditions. The NEA argued that the three-part definition of obscenity in *Miller v. California*[32] would be the controlling standard, but the Dance Foundation and the Museum persisted in their assertion that S 304(a) was vague despite the *Miller* test. The court agreed with the plaintiffs: "The chilling effect on these two plaintiffs arising from the NEA's vague certification requirement is unmistakably clear. . . . the NEA's vow to rely on *Miller* does not cure the vagueness of the obscenity portion of the certification requirement."[33]

The NEA tried to supersede the First Amendment analysis by arguing that the obscenity ban in the certification requirement did not violate the First Amendment because "it is nothing more than a governmental decision not to subsidize the exercise of particular protected expression."[34] The NEA cited a number of cases which held that the government has no constitutional obligation to subsidize an activity merely because it is constitutionally protected: " . . . *Maher v. Roe* (1977) [citation omitted], (government may elect to provide payments to Medicaid recipients for childbirth, but not for non-therapeutic abortions); *Harris v. McRae* (1980) [citation omitted], (government may choose not to subsidize medically necessary abortions, although it opted to subsidize medically necessary services generally); and *Webster v. Reproductive Health Services* (1989) [citation omitted], (state may opt to ban use of public employees and facilities for performance of non-therapeutic abortions)."[35]

But the Dance Foundation and the Museum argued that these cases were inapposite; rather, the relevant cases are those which hold that the government may not impose an unconstitutional condition on the exercise of a fundamental right. The U.S. District Court for the Central District of California agreed with the Foundation and the Museum:

> In simple terms, the government may well be able to put restrictions on who it subsidizes, and how it subsidizes, but once the government moves to subsidize, it cannot do so in a manner that carries with it a level of vagueness that violates the First and Fifth Amendments. . . .
>
> . . . it is evident that certain private funding follows NEA grants. . . . The NEA's role and influence may mean that if an artist chooses not to be bound by the NEA's obscenity restriction, he will not be able to obtain private funding, and therefore, will be worse off than if he had not applied for an NEA grant at all. This is the type of obstacle in the path of the exercise of fundamental speech rights that the constitution will not tolerate.[36]

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The court thus struck down the NEA's administration of the Helms Amendment, holding that the certification requirement violated the First Amendment, and the government did not appeal.

Finley v. National Endowment for the Arts

In November 1990, Congress again amended the NEA's government statute in several respects. Among the changes was the addition of a provision requiring that "general standards of decency and respect for the diverse beliefs and values of the American public" be taken into consideration in making funding decisions.[37] Stating that he refused to be the government's "decency czar" and expressing strong philosophical disagreement with Congress' attempts to impose conditions on arts, NEA Chairman John Frohnmayer announced that he would interpret the "decency" directive as merely advisory.[38]

Finley v. National Endowment for the Arts[39] began in 1990 when the Performance Artists Program Peer Review Panel reviewed 90 applications for NEA grants, from which it selected 18 for funding. The Panel was unanimous in recommending funding for four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller. Karen Finley is a performance artist who slips into the personas of a beaten wife, an abused child, a mother who "creates babies with a man's name on them," then tries desperately to cope without health care or help. At one point in her performance she strips down to her underpants and smears herself with chocolate "as a symbol of women being treated like dirt." She also assumes the characters of a rapist or an abusive husband, acting out the darkest imaginings of men, the furies of mind and body that she sees as the source of violence against women in a work called *We Keep Our Victims Ready*.[40] Holly Hughes is a lesbian playwright and poet who has received a MacDowell Fellowship and a grant from the Jerome Foundation. John Fleck is a performance artist who urinates into a toilet bowl made up like a shrine and bedecked with a picture of Jesus Christ. Tim Miller's performances are as controversial as Fleck's.

In May 1990, NEA Chairperson John Frohnmayer asked the Panel to reconsider three of its recommendations, those for Fleck, Hughes, and Miller. He told the Panel that they did not need to reconsider Finley's application because two of his close friends had attended a Finley performance and had told him that it was not obscene. After reconsidering the three grants, the Panel again unanimously recommended them for funding.

But Frohnmayer was afraid that giving grants to these four performance artists could seriously jeopardize the NEA's very existence because Congress would soon be voting on the NEA's reauthorization. Frohnmayer decided to conduct a telephone poll of the National Council of the NEA and have them vote on whether to fund the four performance artists:

> [NEA Counsel] Julie Davis called each of the members of the [National Council]. . . . None of them liked dealing with this issue any more than I did. Some thought that the [work of Finley, Miller, Fleck and Hughes] was junk. They didn't understand how the panel could have ignored negative comments in letters of recommendation and unfavorable site-visit reports in the application folders. . . . Reflecting a split in their views, others felt that questions of artistry were adequately addressed in the panel's comments. . . . In the end, . . . a majority of the [National Council] voted against the applications of Finley, Hughes and Fleck. Miller's application had already been rejected for incompleteness. . . .
>
> If I was going to approve their grants, I had to have compelling artistic arguments for doing so. These were not at my command—not from the panel's notes, the panel conference call, or the National Council's comments. . . . I could not find enough arguments about Finley's artistic merit, . . . and I could not demonstrate the accountability demanded by Senators Byrd, McClure, Hatch, Kassebaum and others in this political climate by approving her application without some very persuasive reasons.

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[When I tried to explain to the NEA staff why I turned down the four applications], I said that our survival as an agency was no means certain and that all of us must steel ourselves for a continuing battle.[41]

Frohnmayer thus advised Finley, Fleck, Hughes, and Miller in June 1990 that their applications for NEA grants had been denied.

The four performance artists sued the NEA, charging that it had violated their First Amendment rights by denying their applications on impermissible political grounds. Holly Hughes noted that the heavy hand of government was being turned not only against her and Finley, Fleck, and Miller, but against the places where they performed as well: "Various organizations from the NEA to city governments are going after [places that allow us to perform our acts]. The Kitchen in New York is the subject of three grueling audits from the IRS. The WOW Cafe is getting eviction notices. Franklin Furnace was shut down, ostensibly for fire reasons, but really because they presented Karen [Finley]."[42]

In addition to charging that their applications had been denied on political grounds, the four performance artists sought a declaration that the so-called "decency clause"[43] was void for vagueness and violated the First Amendment on its face. They also claimed that the NEA had violated their statutory rights under the "decency clause" by (1) basing the denials on criteria other than those set forth by statute, and (2) failing to follow the procedures mandated by statute.

Judge Wallace Tashima, considering the "decency clause," observed that the plain language of the state requires that "general standards of decency and respect for the diverse beliefs and values of the American public" be taken into consideration in judging grant applications. Considering the legislative history of the decency clause, Tashima noted that "the plethora of comments in the Congressional Record indicates that the 'decency' provision was intended to act as a bar to funding controversial projects or artists. See 136 Cong. Rec. H9410–57 (daily ed. Oct. 11, 1990)(statements by members of Congress explaining that the 'decency' provision would preclude funding of works such as Andres Serrano's 'Piss Christ' and others that would 'deeply offend the sensibilities of significant portions of the public')."[44]

Judge Tashima identified three serious problems with the "decency clause":

1. It creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone's subjective understanding of the standard;
2. Panelists . . . and the Chairperson are given no guidance in administering the standard; each apparently is expected to draw on her or his own personal views of decency or some ephemeral "general American standard of decency"; and
3. It necessarily causes the imposition of self-censorship wider than the line drawn by the state because the line is, in effect, imperceptible.[45]

He concluded that because "the decency provision fails adequately to notify applicants of what is required of them . . . , it cannot be given effect consistent with the Fifth Amendment's due process requirement."[46]

Just as it had argued in *Lewitzky*, the NEA again argued that denying the plaintiffs' grant applications did not violate their First Amendment rights because "the denial is merely a refusal to subsidize plaintiffs' expressive activities—not a barrier to their exercise."[47] The NEA cited *Rust v. Sullivan*,[48] which held that no unconstitutional condition was imposed where grant recipients remain free to engage in abortion-related speech with non-grant

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funds. But the court found *Rust v. Sullivan* inapplicable to *Finley* because the plaintiffs had applied for funding in a category designed to underwrite their professional growth and development (future speech), rather than for funding for a specific work or project. "Thus, the decision to not grant an application in this category cannot be categorized as a refusal to 'subsidize' particular speech because the content of the expression generated through the grants cannot be known in advance. . . . plaintiffs complain that their applications were denied based on the content of their past performances, constituting in effect a penalty for past speech. As such, these allegations are sufficient to state a claim under the First Amendment."[49]

The plaintiffs also alleged that despite the Panel's unanimous recommendation that they be awarded fellowships as "individuals of exceptional talent," Frohnmayer denied those fellowships for political reasons: to appease Congressional critics. The court agreed with the plaintiffs, holding that "Political expediency is neither an expressed nor implied criterion under the statute for the denial of an NEA grant."[50]

The plaintiffs also argued that public subsidization of art, like public funding of the press and university activities, demands government neutrality. They compared artistic freedom to academic freedom in the university, and Judge Tashima agreed: "Artistic expression, no less than academic speech or journalism, is at the core of a democratic society's cultural and political vitality. Congress recognized as much in establishing the NEA. . . . It is clear . . . that artistic expression serves many of the same values central to a democratic society and underlying the First Amendment as does scholarly expression in other fields."[51] Tashima continued:

> Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not. . . . Analogously, professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of "decency" are not. . . . Therefore, the court holds that government funding of the arts is subject to the constraints of the First Amendment. . . .
>
> . . . When a statute directed at speech is overbroad, as is the decency clause, it gives rise to the hazard that a substantial loss or impairment of freedoms of expression will occur. . . .[52]

Judge Tashima thus ruled that the "decency" clause is void for vagueness under the Fifth Amendment and is overbroad under the First Amendment. He also held that the plaintiffs' allegations of content-based funding denial were sufficient to state a claim under the First Amendment; thus, the plaintiffs' case could proceed to trial. Six months after President Clinton took office, the NEA settled out of court with the four artists, agreeing to pay them a total of $252,000.[53]

In an odd twist, however, in spite of the NEA's out-of-court settlement with the four artists, the Department of Justice has not dropped its appeal of the *Finley* decision. Even under the Clinton administration, the Department of Justice appears to be intent upon keeping the "decency" provision. Repeating their assertion that the "decency" statute is unconstitutional, lead counsel David Cole argues: "Requiring consideration of 'decency' and 'respect' is as impermissible in the context of arts funding as it would be in the context of subsidies to public universities or the press. As the district court correctly held, the government's attempt to extend the Supreme Court's holding in *Rust v. Sullivan* . . . to the arts must therefore be rejected."[54]

Cole further observed that former "NEA Chairperson John Frohnmayer repeatedly in-

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sisted upon the necessity for content neutrality, expressly analogizing the Endowment to a public forum. . . . Moreover, [Frohnmayer] noted that 'an agency whose purpose it is to promote creativity doesn't function well with content restrictions, and therefore 'if government is going to be involved . . . it must be content neutral.' "[55] Cole also argued that the "decency" provision is an unconstitutional condition because it penalizes applicants for art created on their own time and with their own money.[56] In an amici brief, the Thomas Jefferson Center for the Protection of Free Expression, the American Association of University Professors, and other groups likewise stressed the point that "Congress may not . . . attach to its grants . . . unconstitutional conditions which punish expression because of its content. Yet the use of vague and undefined terms like 'decency' and 'respect' can have precisely that effect, whether or not intended."[57]

The U.S. Court of Appeals for the Ninth Circuit heard oral arguments in *Finley* in February 1994, but has not yet issued decision.

Artists' Access to Display Works in Public Forums

Artists Dayton Claudio and Jacob Roth who filed the two cases discussed below did not receive NEA grants, but their works were immediately removed from public forums despite their having obtained permission to display them when government or county fair officials found their art dealing with reproductive choice to be offensive or "too political." Although obtaining space to display one's art in a public forum may be a less tangible benefit than an NEA grant, it is well established that access to public forums must be granted on a content-neutral basis.[58]

Claudio v. United States et al.

In *Claudio v. United States et al.*,[59] artist Dayton Claudio had received a permit to display a painting in a federal courthouse in Raleigh, North Carolina under the Public Buildings Cooperative Use Act.[60] He hung his painting entitled "Sex, Laws, and Coathangers" in May 1992, but General Services Administration (GSA) Field Office Manager Steven Grant immediately told Claudio that his license was revoked. The painting was covered and removed within an hour of its unveiling. Claudio filed suit against the U.S. General Services Administration (GSA) in July 1992. His complaint states that the decision to bar his work was based on its political content, a criterion not permitted under either the First Amendment or the GSA's own regulations. The suit names Steven Grant, who originally revoked Claudio's permit to show his work in the courthouse, and David Jameson, the regional director of the GSA's Buildings Management Division, who rejected Claudio's appeal to reinstate the painting. Grant told Claudio in a letter that his painting was "more properly described as a political expression concerning the highly controversial issue of abortion. Since your work is considered to be political in nature, it is not permitted on federal property."[61] David Jameson wrote Claudio a letter saying that the painting "interfered with security in the building and could cause disruption and damage to Government property, [and] the U.S. courts in the building are . . . hearing cases specifically on [abortion]."[62] In his complaint, Claudio charged that Jameson's letter was disingenuous: the painting would not interfere with security; furthermore, "no proceedings concerning abortion were pending in the courts in the Federal Building in Raleigh."[63] The case is currently moving toward a trial on the merits of whether the painting should be reinstated or not.[64]

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Roth v. Howard Recknor and Freeborn County Fair Board

Another case involving art on the subject of abortion has been filed in Minnesota, where 18-year-old Jacob Roth's sculpture entitled "Pro-Choice" was removed from the 4-H Creative Arts Exhibit at the Freeborn (Minnesota) County Fair in August 1992. Roth had been awarded "grand champion" honors at both the Freeborn County and Minnesota State fairs in 1991 for a work titled "Lost in Bondage." But the Fair Board did not like the "Pro-Choice" sculpture, which consisted of a blindfolded woman in a robe with blood streaming from her mouth, nailed to a crucifix with scales of justice hanging from the ends of the cross. The words "Women's Rights" are on a sign at the top of the cross. Fair Board member Howard Recknor informed Roth's father that the sculpture was "gross" and inappropriate and had it removed from display for the duration of the fair. But the Minnesota Citizens Concerned for Life had a booth at the fair which exhibited anti-choice literature, including photographs of aborted fetuses.[65] Roth charged that Recknor and the Fair Board had restricted his access to a public forum because some of them disagreed with the political message of his sculpture. He further charged that Recknor and the Fair Board had violated his First Amendment rights, and sued for damages based on harm to his reputation and his future artistic prospects.[66] The case is currently in the discovery stage.[67]

Discussion

NEA Chairperson Jane Alexander has recently had to grapple with the same issues which confronted John Frohnmayer: during the latter half of 1994 the all-too-familiar controversies about the NEA funding offensive content erupted once again. The *Wall Street Journal* objected to the NEA's funding of "New York's sex-preoccupied Franklin Furnace"[68] In June 1994 the Walker Art Center in Minneapolis, which received over $100,000 from the NEA, sponsored a performance by Ron Athey, an HIV-positive artist who carved a ritual drawing into the back of another man who is not HIV-positive, blotted the blood with a towel and hung the towel over the audience with a clothesline. Senators Robert Byrd and Jesse Helms threatened that the NEA's 1995 funding would be in "serious jeopardy."[69] Jesse Helms introduced an amendment that would have forbidden the NEA to fund any kind of mutilation or bloodletting, but it did not pass in the Senate. Andres Serrano, the creator of "Piss Christ," submitted slides from a series titled "The Morgue," consisting of photographs of cadavers, as part of his application for NEA funding, but he was turned down in August 1994.[70]

The Right-Privilege Distinction

The idea that attaching conditions to governmental benefits is a different matter from direct regulation is traceable to one of the oldest doctrines of American constitutional law: the "right-privilege" distinction.[71] Legal scholar Rodney Smolla explains that under philosopher John Locke's social contract theory, rights exist prior to the state. Individuals possess rights from birth, as entitlements of natural law, before the creation of government.[72] In contrast to rights, "privileges" are interests created by the grace of the state. Based on the "right-privilege" distinction in American constitutional law, the government may not normally restrict individual "rights" unless the curtailment of fundamental "rights" can survive the "strict scrutiny" test in a judicial challenge. The "strict scrutiny" test requires the government to demonstrate that its restrictions are necessary to serve "compelling" ends and are "narrowly tailored" to achieve those ends.[73]

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But Smolla further explains that when the government tries to restrict enjoyment of a privilege, an entirely different analysis was traditionally applied. "Privileges are not rights, but rather are public charity. . . . the giver may attach what conditions he or she pleases to the gift. This elemental proposition should not change, it was thought, when government does the giving."[74] Explaining that Oliver Wendell Holmes was one of the principal architects of the right-privilege distinction, Smolla observes:

> If Holmes' right-privilege distinction were accepted as sound, then the solutions to all free speech issues involving governmental affiliation would be relatively effortless. For in contemporary times, free speech disputes constantly arise in the context of conditions attached to public benefits. Conscientious and consistent application of the right-privilege distinction would make these disputes easy to resolve: The government would always win.
>
> [But] the Holmes view of the right-privilege distinction is intolerable in a modern society that aspires to make itself genuinely open and free. Government is now so large and . . . so ubiquitous that freedom of speech would be rendered an empty guarantee if government retained carte blanche to attach to the receipt of governmental benefits any restrictions on speech that it pleased. . . . Could Holmes be wrong?[75]

Smolla further explains that "the right-privilege distinction must, *at a minimum*, be made subordinate to the Equal Protection Clause."[76] Even when the government is merely doling out charity, it may not violate the Fourteenth Amendment: "The government could not fund the art of whites but not blacks, or Jews but not Catholics, or Democrats but not Republicans."[77] In the wake of the Mapplethorpe controversy and *Finley*, however, one might wonder whether the government has decided to fund the work of those who are "straight" but not those who are gay.

Unconstitutional Conditions

Smolla explains that the Supreme Court "has for decades stated that Holmes was wrong, invoking as an antidote to the 'right-privilege' distinction the 'doctrine of unconstitutional conditions.' "[78] The Court outlined the concept of "unconstitutional conditions," in *Perry v. Sindermann*:[79]

> . . . this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized or inhibited.[80]

In *New School*, *Bella Lewitzky*, and *Finley*, the plaintiffs consistently argued that the NEA had placed an unconstitutional condition on speech. Unfortunately, however, the unconstitutional conditions doctrine has had a long and convoluted history with ambiguous and inconsistent results. This doctrine does not hold that government benefits are "entitlements" that must be provided: for example, the government could choose not to reauthorize the NEA, providing no funding at all. But legal scholar Michael Fitzpatrick explains that "once the government decides to provide a benefit, it may not condition the receipt of the benefit on the relinquishment of fundamental rights, or distribute the benefit using criteria that burden a constitutional right."[81]

Fitzpatrick further observes, however, that two separate lines of irreconcilable cases have

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evolved with regard to the unconstitutional conditions doctrine. In the first line of cases, the Supreme Court found restrictions on benefits to be impermissible "penalties" on speech. In the second line of cases, the Court sustained conditions of accepting government funds as mere "nonsubsidies" of disapproved speech: "Always on a collision course, these two lines of cases ultimately met in *Rust v. Sullivan*."[82]

The first, or "impermissible penalties" line of cases, is as follows:

1958 *Speiser v. Randall*:[83] Supreme Court struck down statute conditioning a veteran's property tax exemption on the recipient's taking a loyalty oath.

1972 *Perry v. Sindermann*:[84] Supreme Court ruled that school system could not refuse to renew a teacher's contract due to statements he had made because government may not "deny a benefit to a person on a basis that infringes . . . his freedom of speech."

1984 *FCC v. League of Women Voters*:[85] Supreme Court invalidated condition denying federal funds to public broadcast stations if they editorialized.

1987 *Arkansas Writers' Project v. Ragland*:[86] Supreme Court struck down Arkansas law which imposed sales tax on general interest magazines but exempted religious, professional, trade, and sports journals; Court held that tax burdens could not be content-based.

Fitzpatrick observes that in sharp contrast to this line of cases, a parallel line of cases dismissed the problems posed by conditional grants by categorizing the restrictions as "nonsubsidies" rather than as unconstitutional "penalties."[87] In these cases the limitations on speech were upheld as "constitutional conditions." The "non-subsidy" cases are as follows:

1959 *Cammarano v. United States*:[88] Supreme Court upheld Treasury Department regulation denying a business expense deduction for lobbying activities.

1976 *Buckley v. Valeo*:[89] Supreme Court held that cap on private campaign expenditures violated First Amendment, but limits could be imposed on a candidate who accepted government campaign funding.

1977 *Maher v. Roe*:[90] Supreme Court upheld state statute denying funding for abortions.

1980 *Harris v. McRae*:[91] Supreme Court upheld federal statute which denied funding for medically necessary abortions.

1983 *Regan v. Taxation with Representation of Washington*:[92] Supreme Court upheld federal income tax laws prohibiting nonprofit organizations from spending tax deductible contributions on lobbying.

1988 *Lyng v. International Union, UAW*:[93] Supreme Court upheld statute making families of striking workers ineligible for food stamps.

1989 *Webster v. Reproductive Health Services*:[94] Supreme Court upheld total ban on use of public facilities for employees to perform abortions.

1991 *Rust v. Sullivan*:[95] Supreme Court upheld Health and Human Services regulation forbidding health professionals in Title X clinics from providing any information on or referrals for abortion whatsoever.

Considering the two conflicting lines of cases above, one legal scholar has observed that the unconstitutional conditions doctrine has "bedeviled courts and commentators" for a

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century.[96] Rodney Smolla observes that what actually exists is a "sometimes doctrine" of unconstitutional conditions.[97] Harvard law professor Kathleen Sullivan describes the doctrine as a "minefield to be traversed gingerly."[98] In its current form, the unconstitutional conditions doctrine provides a way of drawing lines, indicating what sacrifices the government cannot ask recipients of its largess to make and what pressures are permissible.[99] As a solution to the unconstitutional conditions doctrine, law professor David Cole proposes a "spheres of neutrality" approach which would recognize the important role of government funded education, health clinics and arts programs, for example.[100]

Even in *Rust v. Sullivan* the Supreme Court acknowledged that the unconstitutional conditions doctrine represents a "troubled area of our jurisprudence."[101]

In *Rust v. Sullivan* Chief Justice William Rehnquist found that the funding condition, which prohibited Title X clinics from providing abortion counseling and from advocating abortion, constituted a non-subsidy but not a penalty. Rehnquist distinguished *Perry v. Sindermann*, *League of Women Voters*, and *Arkansas Writers' Project*, arguing that *Rust v. Sullivan* was merely "a case of the government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."[102] Justice Blackmun dissented, arguing that the *Speiser-Perry-League of Women Voters-Arkansas Writers' Project* line of cases should have controlled *Rust*.[103]

Confirming the critics' worst fears about *Rust*, Department of Justice attorneys were quick to use *Rust* in several cases involving conditional government grants. In a "gag rule" case involving Stanford University and the National Institute of Health (NIH), the government invoked *Rust* to defend a restriction in an artificial heart research contract requiring university researchers "to obtain government approval before publishing or otherwise publicly discussing preliminary research results."[104] Commenting on the government's reliance on *Rust*, Federal District Judge Harold Greene warned:

> The *Rust* decision opened the door to government review and suppression of speech and publication in areas which had theretofore been widely thought immune from such intrusion; the government's position in this case, if endorsed by the courts, would take that door off its hinges. . . .
>
> . . . few large-scale endeavors are today not supported, directly or indirectly, by government funds—from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious. . . .
>
> To put it another way, if the Supreme Court decision were to be given the scope and breadth defendants advocate in this case, the result would be an invitation to government censorship wherever public funds flow, and acceptance by the courts of defendants' position would thus present an enormous threat to the First Amendment rights of American citizens and to a free society.[105]

Although Judge Greene ruled in favor of Stanford University, rejecting the government's argument that *Rust* should permit "gag orders" on NIH grant recipients, the government has again relied on *Rust* in *Finley v. NEA*. Citing *Rust*, the government has argued that even if the grants to the four performance artists *were* content-based, the "denial of NEA grant funds in no way limits or restricts plaintiffs' speech" because it "is nothing more than a withholding of a subsidy."[106]

The government argues that it merely chooses to use NEA funds to support "some speech and not other speech. Such a decision does not penalize or suppress expression. . . ."[107] But the evidence presented by the *Finley* performance artists about the NEA's funding criteria strongly suggests that the "decency" restrictions could be used to single out disfavored groups, such as gays or other minorities, and suppress their ideas.

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Even though the *Rust* majority explicitly pointed out that universities fall squarely within the "traditional sphere of free expression" exception,[108] this did not deter the Department of Justice, which "has chosen to ignore these exceptions and interpret *Rust* as a source of enhanced authority to restrict all speech activity within the scope of publicly-funded projects."[109]

First Amendment scholar Rodney Smolla has noted that "*Rust* is a case of profound significance. . . . The *Rust* case may portend a retreat from one of the most sophisticated and progressive nuances of modern constitutional law: the idea that government may not accomplish indirectly, by attaching strings to its largess, what it is forbidden to accomplish directly, by passing criminal laws. This retreat is a lamentable defeat for civil liberties."[110]

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Justice Rehnquist and Government Funding

Jesse Helms, Don Wildmon, and the AFA no doubt derived encouragement in their assaults on the NEA from a number of Supreme Court opinions penned by Chief Justice William Rehnquist. In the two most recent of the "impermissible penalties" line of cases, *FCC v. League of Women Voters* and *Arkansas Writers' Project v. Ragland*, Rehnquist dissented from the majority.

The Supreme Court split 5–4 in *FCC v. League of Women Voters of California*.[111] This case involved Section 399 of the Public Broadcasting Act of 1967, which prohibited public radio and television stations from editorializing. Pacifica Foundation and the League of Women Voters of California challenged S 399 on constitutional grounds, and a narrow majority of the Court agreed that Section 399's ban on editorializing violated the First Amendment.

But, as Smolla observes, "what of the right-privilege distinction, and the argument that broadcasters may have a constitutional right to editorialize, but have no constitutional right to editorialize with federal money?"[112] This time Justice Rehnquist wrote the dissent, and made the right-privilege distinction the centerpoint of his dissenting opinion:

> All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the Government appears as the "Big Bad Wolf," and appellee Pacifica as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood to take to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions. . . . Perhaps a more appropriate analogy than that of Little Red Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles; Pacifica, well aware of S 399's condition on its receipt of public money, nonetheless accepted the public money and now seeks to avoid the conditions which Congress legitimately has attached to receipt of that funding.[113]

In Rehnquist's view, stations could thus make a pact with the devil, accepting government money with strings attached, or they could forego all public funds and editorialize all day long.

Just as he dissented in *FCC v. League of Women Voters*, he joined Justice Scalia, who wrote the dissenting opinion in *Arkansas Writers' Project, Inc. v. Ragland*.[114] Scalia and Rehnquist agreed that "denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right [because] . . . such a denial does not, as a general rule, have any significant coercive effect."[115]

In contrast, Rehnquist either authors or concurs in the majority opinion in the "non-subsidy" line of cases. In *Regan v. Taxation with Representation of Washington*,[116] Rehnquist de-

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livered the opinion for a unanimous Court; the Court upheld the Internal Revenue Service's denial of an application by Taxation with Representation (TWR) for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 because it appeared that most of TWR's activities would consist of attempting to influence legislation. Rehnquist explained: "Congress has not infringed any First Amendment rights or regulated any First Amendment activity but has simply chosen not to subsidize TWR's lobbying out of public funds."[117]

Rehnquist joined Justice White's majority opinion in *Lyng v. International Union, UAW*,[118] another "non-subsidy" case. This case dealt with the constitutionality of a 1981 amendment to the Food Stamp Act stating that no household could begin receiving or increase its allotment of food stamps when any member of the household was on strike. The majority held that this amendment did not violate the First Amendment: "The Constitution does not require the Government to furnish funds to maximize the exercise of the right of association or to minimize any resulting economic hardship. . . . The [amendment] does not abridge [the union members'] right to express themselves about union matters. . . . Rather . . . [the amendment] merely declines to extend additional food stamp assistance to strikers simply because the strike has caused a decline in their income."[119]

In other words, striking workers were free to enjoy their guaranteed freedom of speech and assembly until their families became hungry enough for the First Amendment to become an abstract luxury for those who could afford it.

Rehnquist's approval of the idea that the government can place conditions on speech if it is providing the funding reached its nadir in the 5-4 decision of *Rust v. Sullivan*.[120] Of course, the earlier decisions of *Maher v. Roe*,[121] *Harris v. McRae*,[122] and *Webster v. Reproductive Health Services*[123] had all restricted government funding of abortion, but *Rust v. Sullivan* was the first decision in which the Supreme Court upheld viewpoint-based suppression of speech.

As Justice Blackmun wrote in his dissent: "Until today the Court never has upheld a viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech."[124]

Nat Hentoff has observed that in *Rust* the Rehnquist Court took the position that "If you don't like our rules, you don't have to receive our funds" and made it into constitutional law: "If you take any benefits from the government, you will have to, on demand, surrender your First Amendment rights."[125] Hentoff expresses astonishment that the Rehnquist Court would dare to tamper with the doctor-patient relationship.[126]

In sum, Rehnquist has done his utmost to establish the principle that "He who pays the piper calls the tune," or "Who takes the king's shilling becomes the king's man." In Rehnquist's world view, the U.S. government should be able to dictate its moral values if it is providing funds, even to the point of suppressing the speech of those who happen to disagree with whatever the government's position happens to be on a given issue at a given time.

Smolla comments that if Rehnquist's opinion in *Rust v. Sullivan*

looked like the old right-privilege distinction, it *was*. For at bottom, the Court's conservative majority believes in the right-privilege distinction, just as Oliver Wendell Holmes believed in it, and it is coming back.

Those who disagree with *Rust* must have an answer to the Rehnquist argument, an answer to the seductive logic of the right-privilege dichotomy.

The best answer is that the right-privilege distinction . . . is a theory inadequate for modern American life. . . . As government develops more subtle methods of stifling liberty, we must develop more subtle constitutional principles to protect liberty. The First Amendment can be rendered an empty shell if it may be ignored by the government whenever it is "merely" regulating . . . the speech of programs that receive government funds.[127]

Another problem with Rehnquist's arguments and the "seductive logic of the right-privilege dichotomy" is that the Rehnquist position seems to assume a monolithic government in which all government officials agree in advance on a given position before they disperse any funds (as in the suits against the NEA) or even permit access to public forums (as in the cases of artists Dayton Claudio and Jacob Roth).

Those who support creativity among artists, even to the point of outrageousness, are no doubt awaiting the Ninth Circuit's decision in *Finley* with real concern. But whether the issue is funding for the arts, public television, family planning clinics or anything else in the public interest, Rehnquist will no doubt attempt to persuade his eight colleagues once again that the Big Bad Wolf has the right to tell Little Red Riding Hood not only what she may or may not do, but even what she may or may not say.

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Notes

1. 111 S.Ct. 1759, 114 L.Ed.2d 288 (1991).
2. Stipulation and Order, 90 Civ. 3510 (LLS), U.S.D. Southern Dist. N.Y., filed Feb. 20, 1991).
3. 754 F.Supp. 774 (C.D. Cal. 1991).
4. 795 F.Supp. 1457 (C.D.Cal. 1992).
5. *Claudio v. United States, United States General Services Administration, Steven Grant and David Jameson*, No. 92-495-CIV-5-F, Complaint (U.S.D. E. Dist. No. Car., Raleigh Div., filed July 23, 1992).
6. No. C1-92-1354, Complaint (Dist. Ct., 3rd Jud. Dist., Civ. Div., Freeborn County, Minn., filed Nov. 3, 1992).
7. "Blind Criticism," *The Washington Post*, July 13, 1990.
8. Michael Whitney Straight, *Twigs for an Eagle's Nest: The Government and the Arts 1965–1978* (New York: Devon Press, 1979), 81.
9. 20 U.S.C. S 951 (1965).
10. The NEA had a budget of $171 million in 1989, amounting to a per capita expenditure of 71 cents. By contrast, in Canada, Sweden, and France, per capita expenditure on the arts is over $30. Although our federal government spends only 71 cents on the arts for each of us, it spends $1,143 to defend each of us (from Saddam Hussein or the Serbs, perhaps?). Bruce R. Lang, "Commentary: Funding for the Arts, Now More Than Ever," *Providence* (Rhode Island) *Journal-Bulletin*, July 11, 1990, A15.
11. 135 *Cong. Rec.* S5594, daily ed. May 18, 1989, statement of Sen. D'Amato; 135 *Cong. Rec.* S5805, daily ed. May 31, 1989, statement of Sen. Gorton; 135 *Cong. Rec.* H3637, H3640, daily ed. July 12, 1989, statements of Reps. Rohrabacher and Dannemeyer.
12. "95,000 Settlement for Artist," Wilmington (Delaware) *News Journal*, September 22, 1994, A2. The City of Chicago recently agreed to pay $95,000 to artist David Nelson after three aldermen removed his painting of the late Harold Washington in a G-string and bra.
13. Jill A. MacKenzie, "Public Controversy over Funding for the Arts: Media Agenda Building, Media Frames and Effects." Master's thesis, University of Delaware, 1993, 9.
14. Barbara Gamarekian, "Corcoran Apologizes for Cancelling Mapplethorpe Exhibit," *The New York Times*, Sept. 18, 1989, C16.
15. *Contemporary Arts Center v. Ney*, 17 Med. L. Rptr 1814 (U.S. Dist. Southern Dist. Ohio, April 9, 1990). Cincinnati is famous for its well-organized and well-financed anti-pornog-

raphy efforts. The city allows no adult bookstores or nude bars, and local enforcement has battled entertainment perceived as pornographic, including *Hair*, *Oh, Calcutta!*, and *Equus*. In 1983, Warner-Amex Cable was indicted by a grand jury on charges of carrying two adult films that "pandered obscenity" on the Playboy Channel. Warner-Amex settled the case out of court, agreeing not to present programs that would receive an X-rating in Hamilton County (Cincinnati), Ohio. In *Contemporary Arts Center*, a grand jury indicted Dennis Barrie for pandering obscenity on April 7, 1990, the same day the exhibit opened. Had he been found guilty, Barrie could have been jailed for a year, and the Contemporary Arts Center could have been liable for $10,000 in fines. The Contemporary Arts Center immediately requested a preliminary injunction against Arthur Ney, Prosecuting Attorney of Hamilton County, Ohio, Lawrence Whalen, Police Chief of Cincinnati, and Simon Leis, Sheriff of Hamilton County, to enjoin them from interfering with the Mapplethorpe Exhibit. The U.S. District Court for the Southern District of Ohio granted the preliminary injunction pending the outcome of Barrie's criminal trial on charges of obscenity. On October 8, 1990, an eight-member jury of mostly working-class parents who had never been to a contemporary art gallery found Barrie not guilty of obscenity for displaying Mapplethorpe's photographs. Applying the three-part test enunciated in *Miller v. California*, the jurors agreed that (1) the photographs appealed to a prurient interest in sex, and (2) were patently offensive, thus satisfying the first two prongs of the *Miller* test, but Prosecutor Ney's case failed on the third prong of the *Miller* test: the jurors did not find that Mapplethorpe's photographs lacked serious artistic or educational merit.

16. Donald Wildmon himself was involved in a contract dispute related to his portrayal in a documentary film on the arts funding controversy. Wildmon sued Britain's Channel Four International to stop distribution in America of *Damned in the U.S.A.*, a documentary which has received an International Emmy and other prestigious awards. But upon scrutiny of the contract signed by British producer Paul Yule, U.S. district court judge Glen Davidson found that Channel Four had not breached its contract with Wildmon; thus Channel Four was permitted to distribute *Damned in the U.S.A.* in the United States as well as in Europe. *Wildmon and American Family Association, Inc. v. Berwick Universal Pictures et al.*, No. EC 91-320-D-G, Memorandum Opinion and Declaratory Judgment (U.S.D. N.E. Dist. Miss., Eastern Div., filed Sept. 8, 1992).
17. William A. Henry III, "You Can Take This Grant and . . . : Arts Groups are Spurning the NEA's Anti-Obscenity Clause," *Time*, July 16, 1990, 85.
18. *Wojnarowicz v. American Family Association*, 745 F. Supp 130 (S.D.N.Y. 1990); *Wojnarowicz v. American Family Association*, 772 F. Supp 201 (S.D.N.Y. 1991). The NEA had awarded $15,000 to the University Galleries at Illinois State University in Normal, Illinois to cover the costs of showing Wojnarowicz' "Tongues of Flame" exhibit. Many of Wojnarowicz' works were designed to bring attention to the devastation wrought y AIDS upon the gay community and his view that the U.S. government had failed to confront the AIDS epidemic in any meaningful way. Without Wojnarowicz' permission, the AFA publication *Human Events* reproduced a collage from "Tongues of Flame" which included 14 fragments of the artist's work. Eleven of these depicted explicit sexual acts, one portrayed Jesus Christ as a drug addict in the act of injecting drugs into his arm with a syringe, and two scenes were ambiguous. The *Human Events* pamphlet, entitled "Your Tax Dollars Helped Pay for These 'Works of Art,' " argued for an immediate end to all public funding of the NEA. It was sent to 523 members of Congress, 3,230 Christian leaders, 947 Christian radio stations, and 1,578 newspapers. David Wojnarowicz sued the AFA and *Human Events* for copyright infringement, defamation, and violation of the New York Artists' Authorship Rights Act, charging that they had taken his work out of context. Finding that the AFA's reproduction of Wojnarowicz's work constituted a fair use with absence of malice, the court dismissed the charges of copyright infringement and defamation respectively. Although the court acknowledged that the AFA's protest against the subsidy of art is entitled to the utmost First Amendment protection, it found in favor of Wojnarowicz with regard to the New York Artists' Authorship Rights Act, which proscribes alterations of reproductions as well as original works. Not only did the court enjoin the AFA from further publication and distribution of the pamphlet; it also required the AFA to distribute a corrective message to all those who had received the original pamphlet. Because Wojnarowicz was unable to show any actual

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damages in the form of museums cancelling his exhibits, the court awarded him nominal damages of $1.00.

19. American Family Association, "Is This How You Want Your Tax Dollars Spent?" *The Washington Times*, Feb. 13, 1990, A5.
20. National Endowment for the Arts, "Open Letter to the American Family Association," *National Endowment for the Arts News*, Feb. 6, 1990.
21. The Kitchen (press release, Feb. 7, 1990).
22. Section 304(a), Dept. of Interior and Related Agencies Appropriation Act of 1990; Public Law 101-121, 103 Stat. 701, 741, Oct. 23, 1989.
23. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 177-78.
24. John Frohnmayer, *Leaving Town Alive: Confessions of an Arts Warrior* (Boston: Houghton Mifflin Company, 1993), 297.
25. William A. Henry III, "You Can Take This Grant and . . . : Arts Groups are Spurning the NEA's Anti-Obscenity Clause," *Time*, July 16, 1990, 85.
26. John Frohnmayer, *Leaving Town Alive: Confessions of an Arts Warrior* (Boston: Houghton Mifflin, 1993), 133-35.
27. Stipulation and Order, No. 90 Civ. 3510 (LLS), (U.S.D. Southern Dist. N.Y., filed Feb. 20, 1991).
28. 754 F. Supp. at 783 (C.D. Cal. 1991).
29. *New School for Social Research v. John Frohnmayer and NEA*, Plaintiff's Memorandum of Law in Reply to Defendants' Memorandum of Law in Opposition to Plaintiff's Motions for a Preliminary Injunction and for Summary Judgment and in Opposition to Defendants' Motion to Dismiss or for Summary Judgment, 35, No. 90 Civ. 3510 (LLS), (U.S.D. Southern Dist. N.Y., filed Aug. 3, 1990).
30. *Id.*, 46-48.
31. *New School for Social Research v. John Frohnmayer and NEA*, Addendum to Stipulation and Order, No. 90 Civ. 3510 (LLS), (U.S.D. Southern Dist. N.Y., filed Aug. 3, 1990).
32. 413 U.S. 15 (1973).
33. *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774, 783 (C.D. Cal. 1991).
34. *Id.*, 784.
35. *Idem.*
36. *Id.*, 784-85.
37. 1990 Amendments, Public Law No. 101-512, S 103(b), 104 Stat. 1963, codified at 20 U.S.C. S 954(d).
38. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 176-77.
39. 795 F.Supp. 1457 (C.D.Cal. 1992)
40. Robert Hughes, "Whose Art Is It, Anyway?" *Time*, June 4, 1990, 48.
41. John Frohnmayer, *Leaving Town Alive: Confessions of an Arts Warrior* (Boston: Houghton Mifflin, 1993), 173-75.
42. Jan Breslauer, "No Funds, Much Fury," *Los Angeles Times*, July 16, 1990, F1, F7.
43. National Foundation on the Arts and Humanities Act of 1965, as amended, 20 U.S.C. S 954(d).
44. *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1470 (C.D. Cal. 1992).
45. *Id.*, 1472.
46. *Idem.*
47. *Id.*, 1463.
48. 111 S.Ct. 1759, 114 L.Ed.2d 288 (1991).
49. *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457, 1463-64 (C.D. Cal. 1992).
50. *Id.*, 1465.
51. *Id.*, 1473-74.
52. *Id.*, 1475-76.
53. "NEA Settles with Artists," (Wilmington, Delaware) *News Journal*, June 5, 1993, A2.
54. *Finley v. National Endowment for the Arts*, Brief for Appellees, 34-35, No. 92-56028, 92. 56387, 93-55089 (9th Cir. June 2, 1993).
55. *Id.*, 41.

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56. *Id.*, 43.
57. *Finley v. National Endowment for the Arts*, Brief of Amici Curiae, 22, Nos 92-56028, 92-56387, 93-55089 (9th Cir. June 2, 1993).
58. See, for example, *Chicago Police Department v. Mosely*, 408 U.S. 92 (1972); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).
59. *Claudio v. United States, United States General Services Administration, Steven Grant and David Jameson*, No. 92-495-CIV-5-F, Complaint (U.S.D. E. Dist. No. Car., Raleigh Div., filed July 23, 1992).
60. 40 U.S.C. Secs. 490, 601a, 612 and corresponding regulations 41 C.F.R. Sec. 101-20.400 *et seq.*, pursuant to Administrative Procedures Act, 5 U.S.C. Sec. 702.
61. *Claudio v. United States, United States General Services Administration, Steven Grant and David Jameson*, No. 92-495-CIV-5-F, Complaint at 6 (U.S.D. E. Dist. No. Car., Raleigh Div., filed July 23, 1992).
62. *Id.*, 7.
63. *Id.*, 8.
64. *Claudio v. United States, United States General Services Administration, Steven Grant and David Jameson*, No. 92-495-CIV-5-F, Order Granting Defendants Extension of Time (U.S.D. E. Dist. No. Car., Raleigh Div., filed June 29, 1993).
65. *Roth v. Recknor, Freeborn County Fair Board and Freeborn County*, No. C1-92-1354, Complaint, 6 (Dist. Ct., 3rd Jud. Dist. Civ. Div., Freeborn County, Minn., filed Nov. 3, 1992).
66. *Id.*, 9.
67. *Roth v. Recknor, Freeborn County Fair Board and Freeborn County*, No. C1-92-1354, Interrogatories, Request for Production of Documents, and Requests for Admissions (Dist. Ct., 3rd Jud. Dist. Civ. Div., Freeborn County, Minn., filed June 17, 1993).
68. "Asides: Alexander's NEA," *Wall Street Journal*, May 17, 1994, A20.
69. Jacqueline Trescott, "Honeymoon's Over: Legislators Threaten Arts Agency Again," *Washington Post*, June 21, 1994, D1; Jacqueline Trescostt, "NEA Takes Modest Cut: House Rejects 5 Percent Arts Budget Slice," *Washington Post*, June 24, 1994, B1; "Don't Cut the Arts Fund," *Washington Post*, July 15, 1994, A14.
70. Jacqueline Trescott, "Denial of Grant Fuels NEA Debate," Wilmington (Delaware) *News Journal*, August 9, 1994, D6.
71. Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harvard Law Review* 1439 (1968).
72. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 178.
73. See *Sable Communications of California, Inc. v. FCC*, 109 S.Ct. 2829, 2836 (1989) (applying strict scrutiny in context of free speech).
74. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 179.
75. *Id.*, 181-82.
76. *Id.*, 183.
77. *Id.*, 183.
78. *Id.*, 182.
79. 408 U.S. 593 (1972).
80. *Id.*, 597.
81. Michael Fitzpatrick, "Rust Corrodes: The First Amendment Implications of *Rust v. Sullivan*, 45 *Stanford Law Review* 185, 189 (November 1992).
82. *Id.*, 190.
83. 357 U.S. 513 (1958).
84. 408 U.S. 593 at 597 (1972).
85. 468 U.S. 364 (1984).
86. 481 U.S. 221 (1987).
87. Michael Fitzpatrick, "Rust Corrodes: The First Amendment Implications of *Rust v. Sullivan*, 45 *Stanford Law Review* 185, 191 (November 1992).
88. 358 U.S. 498 (1959).
89. 424 U.S. 1 (1976).
90. 432 U.S. 464 (1977).
91. 448 U.S. 297 (1980).
92. 461 U.S. 540 (1983).

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93. 485 U.S. 360 (1988).
94. 492 U.S. 490 (1989).
95. 111 S.Ct. 1759, 114 L.Ed.2d 288 (1991).
96. R. A. Epstein, "The Supreme Court, 1987 Term-Forward: Unconstitutional Conditions, State Power, and the Limits of Consent," 102 *Harvard Law Review* 4, 6 (1988).
97. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 183.
98. Kathleen M. Sullivan, "Unconstitutional Conditions," 102 *Harvard Law Review* 1413, 1415–16 (1989).
99. "Standards for Federal Funding of the Arts: Free Expression and Political Control," 103 *Harvard Law Review* 1969, 1981.
100. David Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech," 67 *New York University Law Review* 675 (October 1992).
101. *Rust v. Sullivan, 111 S.Ct. 1759, 1779 (1991).*
102. *Id.*, 1773.
103. *Id.*, 1780–81.
104. *Board of Trustees of Stanford University v. Sullivan*, 773 F.Supp. 472, 473 (D.D.C. 1991).
105. *Id.*, 478.
106. Memorandum in Support of Defendants' Motion for Judgment on the Pleadings, 3, *Finley v. National Endowment for the Arts*, 795 F.Supp 1457 (C.D. Cal. 1992), *appeal docketed*, Nos. 92-56028, 92-56387, 93-55089 (9th Cir. June 2, 1993).
107. Reply Memorandum in Support of Defendants' Motion for Judgment on the Pleadings, 12, *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457 (C.D. Cal. 1992), *appeal docketed*, Nos. 92-56028, 92-56387, 93-55089 (9th Cir. June 2, 1993).
108. *Rust v. Sullivan*, 111 S.Ct. 1759, 1776 (1991).
109. Michael Fitzpatrick, "Rust Corrodes: The First Amendment Implications of *Rust v. Sullivan*, 45 *Stanford Law Review* 185 (November 1992), 227.
110. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 218.
111. 468 U.S. 364 (1984).
112. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 188.
113. *FCC v. League of Women Voters of California*, 468 U.S. 364, 402–3 (1984).
114. 481 U.S. 221 (1987).
115. *Id.*, 237.
116. 461 U.S. 540 (1983).
117. *Id.*, 540–41.
118. 108 S.Ct. 1184 (1988).
119. *Id.*, 1186–87.
120. 111 S.Ct. 1759, 114 L.Ed.2d 288 (1991).
121. 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).
122. 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).
123. 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989).
124. *Rust v. Sullivan*, 111 S.Ct. 1759, 1780 (1991).
125. Nat Hentoff, *Free Speech for Me—But Not for Thee* (New York: HarperCollins, 1992), 92.
126. *Id.*, 93.
127. Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992), 218.

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